

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

REX - REAL ESTATE EXCHANGE,  
INC.,

Plaintiff,

v.

ZILLOW, INC., et al.,

Defendants.

Case No. 2:21-CV-00312-TSZ

ZILLOW DEFENDANTS' MOTION  
FOR PROTECTIVE ORDER TO  
VACATE THE DEPOSITION OF RICH  
BARTON

NOTE ON MOTION CALENDAR: May  
5, 2023

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1     **I.       CERTIFICATION OF MEET AND CONFER**

2             Pursuant to Local Civil Rule 26(c)(1), Zillow Defendants certify that they have met and  
3     conferred in good faith and are not able to resolve this dispute. Counsel for Zillow Defendants,  
4     Russ Cohen, Laura Najemy, and Jesse Beringer, met and conferred telephonically with counsel  
5     for Plaintiff, Carl Goldfarb and Ursula Ungaro, on March 21, March 27, April 11, and April 18,  
6     2023.

7     **II.      INTRODUCTION AND RELIEF REQUESTED**

8             The apex doctrine is designed to protect against precisely the tactics that Plaintiff REX—  
9     Real Estate Exchange Inc. (“Plaintiff” or “REX”) is attempting to engage in here—abusing the  
10    discovery process to attempt to reach an apex official that has no unique, non-duplicative,  
11    firsthand knowledge of the facts at issue in this case without first exhausting any and all less  
12    intrusive means of getting the information it purports to seek. In particular, Plaintiff seeks to  
13    depose Zillow Group Inc.’s (“Zillow”) CEO, Richard Barton, to obtain information about  
14    Project Bookshelf (*i.e.*, Zillow’s decision to obtain listings data through internet data exchange  
15    (“IDX”) feeds, and to join various MLSs). Plaintiff has not made the requisite showing to justify  
16    deposing an apex official like Mr. Barton, warranting an order from this Court granting the  
17    motion.

18            This is no academic objection. As Zillow has explained repeatedly, in interrogatory  
19    responses and multiple meet-and-confers, Mr. Barton has ***no unique, non-duplicative personal***  
20    ***knowledge*** about Project Bookshelf. The Project began before Mr. Barton was CEO, and  
21    Plaintiff already is scheduled, within the next two weeks, to depose two other high-level Zillow  
22    employees who were directly involved in that Project. These other witnesses have far greater  
23    knowledge of Project Bookshelf than Mr. Barton, rendering a deposition of Mr. Barton entirely  
24    unnecessary. Indeed, the fact that Plaintiff has failed to comply with even the most basic  
25    requirement for justifying a deposition of an apex witness—making sure that deposition is truly  
26    necessary, by first exhausting all the less intrusive ways to gain the information sought—alone  
27    warrants granting this motion. Plaintiff simply has no basis to claim that these depositions will  
28

1 not eliminate the need for Mr. Barton’s deposition altogether, and Mr. Barton’s deposition  
2 should thus be vacated.

3 Accordingly, Zillow Defendants respectfully request that this Court enter a protective  
4 order prohibiting Plaintiff from taking Mr. Barton’s deposition.

### 5 **III. FACTUAL BACKGROUND**

#### 6 **A. Plaintiff Served a Deposition Notice for Zillow CEO Richard Barton** 7 **Seeking Information Regarding Zillow’s Decision to Proceed with Project** 8 **Bookshelf and to Join Various MLSS.**

9 On March 9, 2023, Plaintiff served a notice of videotaped deposition for Rich Barton for  
10 May 1, 2023. Declaration of Russell Cohen (“Cohen Decl.”) ¶ 2. The parties first met and  
11 conferred on March 21, 2023, during which Zillow Defendants informed Plaintiff that Mr.  
12 Barton is the CEO and does not have any material involvement in the issues of this case. Cohen  
13 Decl. ¶ 3. In response, Plaintiff claims it has observed Mr. Barton’s name on Board documents,  
14 some of which mention Project Bookshelf, and argued that because Project Bookshelf was  
15 “important” for Zillow, Mr. Barton was an appropriate witness by virtue of his presence on these  
16 high-level summaries. Cohen Decl. ¶ 3.

17 Project Bookshelf, which began in 2018, involved various Zillow stakeholders, including  
18 Errol Samuelson (Chief Industry Development Officer) and Curt Beardsley (Vice President of  
19 Industry Development, Industry Data Support & Operations). Cohen Decl. ¶¶ 5, 8. Both Mr.  
20 Samuelson and Mr. Beardsley—whose depositions are currently scheduled for April 27 and May  
21 4, respectively—were integrally involved in leading Zillow’s efforts relating to Project  
22 Bookshelf. Cohen Decl. ¶ 8. In fact, Mr. Samuelson already has submitted a declaration in this  
23 case (in connection with Zillow’s opposition to REX’s motion for a preliminary injunction (Dkt.  
24 No. 61)) regarding Zillow’s switch to IDX feeds, and was deposed earlier in this matter as a  
25 30(b)(6) representative of Zillow on these very issues.

#### 26 **B. Zillow Defendants Served an Interrogatory Response Regarding Zillow’s** 27 **Decision to Proceed with Project Bookshelf and to Join Various MLSS.**

28 Counsel for Zillow suggested that the parties continue the meet and confer process  
regarding the appropriateness of Mr. Barton’s deposition following the Zillow Defendants’

1 response to Plaintiff’s Interrogatory No. 21, which was due later that week on March 23, 2023.  
2 Cohen Decl. ¶ 3. Interrogatory No. 21 asked the Zillow Defendants to “[d]escribe in detail who  
3 made the decision to proceed with Project Bookshelf, to join NAR, and to join various MLSs,  
4 and explain when those decisions were made and if those decisions were not made by Zillow’s  
5 Board of Directors, explain why they were not made by the Board of Directors.” Cohen Decl.  
6 ¶ 4.

7 The Zillow Defendants’ March 23, 2023 response, which was supplemented on April 6,  
8 2023, after another meet and confer, makes clear that there was no specific, discrete, express, or  
9 singularly identifiable decision to proceed with Project Bookshelf, to join NAR, and to join  
10 various MLSs. Cohen Decl. ¶ 5. Instead, as previously disclosed in its Interrogatory responses,  
11 Zillow had considered for many years switching to IDX feeds and began pursuing this effort  
12 again in earnest in October 2018. Cohen Decl. ¶ 5. The Zillow Defendants also listed 12  
13 individuals that comprised the key group of leaders that provided input into the go-forward  
14 decision for Project Bookshelf, including Curt Beardsley and Errol Samuelson, and detailed how  
15 the Board was kept apprised of the decision and related efforts. Cohen Decl. ¶ 5. Finally, the  
16 Zillow Defendants acknowledged in their Interrogatory responses that Mr. Barton provided  
17 input and supported the decision to proceed with Project Bookshelf, as outlined and spearheaded  
18 by those 12 individuals. Cohen Decl. ¶ 5. Notably, the Zillow Defendants’ Interrogatory  
19 responses do not indicate or suggest that Mr. Barton has or had any *unique* knowledge relating  
20 to the go-forward decision for Project Bookshelf or any other aspect of Project Bookshelf, and,  
21 in fact, he was not an explicit or exclusive decision maker for the Project.

22 **C. Plaintiff Identified Nine Documents to Justify Deposing Mr. Barton.**

23 On March 24, 2023, Plaintiff identified a set of nine documents “involving Mr. Barton”  
24 that it contended justified deposing him. Cohen Decl. ¶ 6. These documents consist of  
25 memoranda to the Board of Directors, minutes from a Board of Directors meeting, and an agenda  
26 for a Board of Directors meeting. Cohen Decl. ¶ 6. As CEO, Mr. Barton regularly compiled  
27 high-level summaries to be included in memoranda to the Board of Directors regarding various  
28

1 issues of interest, including Project Bookshelf. Cohen Decl. ¶ 6. Plaintiff contends that Mr.  
2 Barton's involvement in communicating this limited, high-level, summary information to the  
3 Board is a sufficient basis for his deposition. Cohen Decl. ¶ 6. Yet, Plaintiff has not identified  
4 any documents beyond these *summary materials* that would suggest that Mr. Barton has or had  
5 any *unique* knowledge regarding Project Bookshelf that he shared with the Board.

6 **D. Depositions of Mr. Beardsley and Mr. Samuelson, Both of Whom Were**  
7 **Integrally Involved in Project Bookshelf, Have Not Been Completed.**

8 On April 11, 2023, the parties met and conferred again. During this meet and confer,  
9 Counsel for Plaintiff and the Zillow Defendants discussed the upcoming depositions of Zillow's  
10 Chief Industry Development Officer, Errol Samuelson, and Vice President of Industry  
11 Development, Curt Beardsley. Cohen Decl. ¶ 8. These depositions are scheduled to take place  
12 on April 27 and May 4, 2023, respectively. Cohen Decl. ¶ 8. Since both Mr. Samuelson and  
13 Mr. Beardsley were integrally involved with Project Bookshelf, as disclosed in the Zillow  
14 Defendants' response to Interrogatory No. 21, and as evident from the documents produced by  
15 the Zillow Defendants, Counsel for Zillow explained that it did not make sense to consider  
16 scheduling Mr. Barton's deposition. Cohen Decl. ¶ 8. Indeed, Zillow expects that the  
17 depositions of Mr. Samuelson and Mr. Beardsley will render a deposition of Mr. Barton entirely  
18 unnecessary.

19 **E. Plaintiff Continued to Pursue Apex Deposition.**

20 On April 14, 2023, Counsel for Plaintiff emailed Counsel for the Zillow Defendants to  
21 provide an additional basis to depose Mr. Barton. *See* Cohen Decl. ¶ 9. Plaintiff now argues  
22 that Mr. Barton was brought in as CEO in February 2019 to preside over an allegedly massive  
23 change in Zillow's business strategy to buy homes and originate mortgages (*i.e.*, Zillow Offers).  
24 Cohen Decl. ¶ 9. Additionally, Plaintiff continues to argue that Mr. Barton was also CEO during  
25 the time in which Zillow began to gain access to IDX feeds and changed its display of search  
26 results for real estate listings. Cohen Decl. ¶ 9. According to Plaintiff, Mr. Barton, by virtue of  
27 his time in the role of CEO, has a unique perspective on why Zillow made the choices and  
28

tradeoffs it did and why it took the risks it did, and reported such perspective to Zillow’s Board.  
Cohen Decl. ¶ 9.

#### IV. ARGUMENT

This Court has the authority to limit Plaintiff’s ability to depose an official at the highest levels of corporate management unless Plaintiff can establish (1) that the official has unique, non-duplicative, firsthand knowledge of the relevant facts at issue in this case, and (2) that Plaintiff has exhausted less intrusive means of discovery. There can be no dispute that Mr. Barton, as the CEO of Zillow, qualifies as an apex official. This Court should prevent his deposition as Plaintiff has not—and cannot—meet either requirement for deposing him.

##### A. This Court Has the Authority to Issue a Protective Order Preventing the Deposition of an Apex Official.

A court may issue a protective order to protect a party or person “from annoyance, embarrassment, oppression, or undue burden or expense.” *Sargent v. City of Seattle*, No. C12-1232 TSZ, 2013 WL 1898213, at \*1 (W.D. Wash. May 7, 2013). As relevant here, “[v]irtually every court that has addressed deposition notices directed at an official at the highest level or apex[] of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment.” *Robinett v. Opus Bank*, No. C12-1755MJP, 2013 WL 5850873, at \*5 (W.D. Wash. Oct. 30, 2013). Thus, “[i]n order to curb the potential for abuse, a party seeking an ‘apex deposition’ must establish that the executive

[1] has unique, non-repetitive, firsthand knowledge of the facts at issue in the case, and [2] that other less intrusive means of discovery such as interrogatories and depositions of other employees, have been exhausted without success.”

*Id.* Courts regularly refuse to permit apex depositions where a party fails to make this showing. See *Rookaird v. BNSF Ry. Co.*, No. C14-176RSL, 2015 WL 11233096, at \*2 (W.D. Wash. July 8, 2015) (denying apex deposition where “plaintiff’s questions ... are more likely to simply embarrass this witness than yield unique and relevant information”); *In re Packaged Seafood Prods. Antitrust Litig.*, No. 15-MD-2670-JLS-MDD, 2018 WL 4205038, at \*2 (S.D. Cal. Sept. 4, 2018) (denying apex deposition where “not convinced ... that [the witness] has unique,



1 personal information” even if plaintiff had “exhausted less intrusive means”); *In re TFT-LCD*  
2 *(Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2011 WL 10967617, at \*2 (N.D. Cal. Aug. 1,  
3 2011) (denying depositions of CEO and Chairman where plaintiffs failed to establish that either  
4 had unique knowledge of price fixing conspiracy).

5 **B. The Apex Deposition of CEO Richard Barton is Not Proper.**

6 Plaintiff’s attempt to justify the deposition of CEO Richard Barton fails at both steps of  
7 the inquiry. It cannot point to any unique, non-repetitive, firsthand knowledge that Mr. Barton  
8 possesses with respect to any of the facts at issue at this case. § IV.B.1. Nor can Plaintiff  
9 possibly claim that it has exhausted all less intrusive means of obtaining any knowledge it claims  
10 Mr. Barton does have. § IV.B.2.

11 1. *Mr. Barton Does Not Have Unique, Non-Repetitive, Firsthand*  
12 *Knowledge Relevant to this Case.*

13 Plaintiff has claimed that it is necessary to depose Mr. Barton due to his knowledge of  
14 (1) Project Bookshelf and (2) the Zillow Offers program. Neither justifies his deposition here.

15 **a. Project Bookshelf.** In contending that Mr. Barton has relevant knowledge of Project  
16 Bookshelf, Plaintiff has focused on Mr. Barton’s general awareness and support of Project  
17 Bookshelf, including by providing high-level summaries of that Project to the Board of  
18 Directors.

19 But it is unremarkable for a CEO to engage in conduct like this, and the caselaw reflects  
20 that awareness and information sharing of the kind seen here does not mean that the CEO has  
21 unique knowledge warranting his deposition. *See, e.g., Doble v. Mega Life & Health Ins. Co.*,  
22 No. C 09-1611 CRB (JL), 2010 WL 1998904, at \*3 (N.D. Cal. May 18, 2010) (holding CEO’s  
23 emails regarding decision at best showed “pure high-level management, and not the type of  
24 hands-on action which demonstrates the unique personal knowledge required to compel a  
25 deposition of a CEO”); *Robinett*, 2013 WL 5850873, at \*6 (“[c]ase law abounds with opinions  
26 which stand for the proposition that the ‘mere fact that [a CEO] made public statements, even  
27 on issues that [the plaintiff] considers relevant to its claims, are (sic) insufficient to justify his  
28 deposition.’”) (first alteration in original) (internal quotation marks omitted).

1 In fact, the record reflects that Mr. Barton’s involvement with Project Bookshelf is more  
2 attenuated than Plaintiff would claim. *First*, Bookshelf was commenced prior to Mr. Barton  
3 becoming CEO in 2019. *See* Cohen Decl. ¶¶ 5, 9. *Second*, the Bookshelf effort was not the  
4 product of an express or exclusive decision from Mr. Barton. Cohen Decl. ¶ 5. *Third*, Mr.  
5 Barton’s communications with the Board at best show that he simply compiled information to  
6 keep the Board apprised. Cohen Decl. ¶ 6. There is no indication that Mr. Barton was  
7 exclusively involved in any decision with respect to proceeding with Project Bookshelf and the  
8 switch to IDX feeds.

9 Even accepting Plaintiff’s position that Mr. Barton played an active role with respect to  
10 Project Bookshelf, Plaintiff still cannot claim that any knowledge he has about that Project is  
11 *unique* to him. There is no indication that any information about Project Bookshelf and the  
12 switch to IDX feeds that was communicated to the Board was not already known to other  
13 employees who were more intimately involved in Project Bookshelf. Plaintiff should recognize  
14 as much, as it already has scheduled depositions of two people with far more detailed knowledge  
15 of Project Bookshelf than Mr. Barton—Mr. Samuelson and Mr. Beardsley. Both were among  
16 the 12 individuals Zillow identified, in response to Interrogatory No. 21, as comprising the key  
17 group of leaders that provided input into the efforts to proceed with Project Bookshelf. Mr.  
18 Barton’s role with respect to Project Bookshelf, by contrast, was merely supporting efforts  
19 *outlined and spearheaded by those 12 individuals*. Cohen Decl. ¶ 5. Accordingly, any  
20 testimony Mr. Barton would give with respect to that Project “likely would be cumulative and  
21 not unique.” *Packaged Seafood Prods. Antitrust Litig.*, 2018 WL 4205038, at \*2.

22 **b. Zillow Offers.** Without a basis to establish that Mr. Barton has non-duplicative,  
23 unique personal knowledge about Project Bookshelf, Plaintiff more recently pivoted to say that  
24 Mr. Barton was extensively involved with Zillow’s business decision to begin buying homes  
25 and originating mortgages (Zillow Offers). *See* Cohen Decl. ¶ 9.

26 Even if Mr. Barton has unique, non-duplicative personal knowledge about some aspects  
27 of Zillow Offers, that still would not justify his deposition, because Zillow Offers is, at best,  
28

1 peripheral to this case. To the extent Zillow Offers is relevant to this case at all, it is only with  
2 respect to how Zillow Offers may have provided some further rationale for proceeding with  
3 Project Bookshelf beginning in 2018, again at a time when Mr. Barton was not CEO. Plaintiff's  
4 claims in this action focus almost entirely on the change to Zillow's website display that resulted  
5 from Project Bookshelf (e.g., Dkt. No. 99, Amended Compl., ¶¶ 135-36, 145-50, 168-78, 197-  
6 201, 203-16). Indeed, Zillow Offers, a business that Zillow decided to wind down in November  
7 2021, is *referred to in just a single paragraph in the Amended Complaint* (Dkt. No. 99,  
8 Amended Compl., ¶ 57). While one of the various rationales for Zillow becoming a brokerage  
9 and joining local MLSs was the expansion of Zillow Offers (see Dkt. No. 61, Decl. of Errol  
10 Samuelson, ¶¶ 51-52), that does not mean this case is about Zillow Offers or that everything  
11 related to Zillow Offers must be relevant to this case. Plaintiff's attempt to explore Zillow  
12 Offers—in a way untethered from the Project Bookshelf-based claims it has raised—is just the  
13 latest in a series of attempts by Plaintiff to impermissibly broaden its claims beyond its complaint  
14 and further evidences that it is seeking Mr. Barton's deposition to abuse the discovery process.  
15 Plaintiff should not be allowed to use so narrow a foothold to manufacture a deposition of an  
16 apex witness.<sup>1</sup>

17 To that end, Plaintiff has not established that Mr. Barton has any unique knowledge with  
18 respect to the way Zillow Offers relates to the Project Bookshelf-based claims at issue in this  
19 case. As Mr. Samuelson's earlier declaration indicates (see Dkt. No. 61, Decl. of Errol  
20 Samuelson, ¶¶ 51-52), Mr. Barton is not the only witness with knowledge about Zillow Offers.  
21 Most critically, the declaration indicates that Mr. Samuelson has knowledge of the ways in  
22 which Zillow Offers might have been relevant to Project Bookshelf (Dkt. No. 61, Decl. of Errol  
23 Samuelson, ¶¶ 51-52).

24 In short, Plaintiff has not established that Mr. Barton has any knowledge relevant to this  
25 case that is truly unique. His deposition should be prevented for this reason alone.

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26 <sup>1</sup> The attenuated role that Zillow Offers plays here distinguishes this case from *In re Apple*  
27 *iPhone Antitrust Litigation*, No. 11-CV-06714 YGR-TSH, 2021 WL 485709, at \*3 (N.D. Cal.  
28 Jan. 26, 2021), where the claim “embrace[d] ***much*** of Apple's business model,” and not just a  
narrow part of it. See *id.* (emphasis added).

1                   2.     *Plaintiff Cannot Show that Less Intrusive Means of Discovery, Such as*  
2                             *Depositions of Other Employees, Have Been Exhausted Without*  
3                             *Success.*

4             Plaintiff's attempt to depose Mr. Barton must fail for yet a second reason: It has not  
5     established that it has exhausted all less intrusive means of discovery.

6             Plaintiff already has noticed but not yet taken the depositions of Mr. Samuelson and Mr.  
7     Beardsley, the very same witnesses that render Mr. Barton's knowledge non-unique and  
8     duplicative. Again, as explained above, both Mr. Samuelson and Mr. Beardsley were integrally  
9     involved in Project Bookshelf, including the decision to switch to IDX feeds and make the  
10    display change on Zillow's website. As a result, Plaintiff must exhaust those avenues of  
11    discovery before seeking an apex deposition. *See Celerity, Inc. v. Ultra Clean Holding, Inc.*,  
12    No. C05-4374 MMS (JL), 2007 WL 205067, at \*5 (N.D. Cal. Jan. 25, 2007) (holding defendant  
13    could only depose Celerity CEO Murphy and Executive Chairman of the Board Shimmon after  
14    it had made "a good faith effort to extract the information it seeks from interrogatories and  
15    depositions of lower-level Celerity employees"); *see also Kelley v. Microsoft Corp.*, No. C07-  
16    0475MJP, 2008 WL 5000278 (W.D. Wash. Nov. 21, 2008) (in allowing proposed apex  
17    deposition to proceed, observing that "[p]laintiffs here have completed depositions of lower  
18    level officers" and completed other discovery in addition to showing that CEO had relevant,  
19    unique personal knowledge).

20            Scheduling Mr. Barton's deposition now, under the assumption that Plaintiff will not  
21    obtain the information it seeks from Mr. Samuelson or Mr. Beardsley, is neither proper nor  
22    warranted. Plaintiff must first make a **good faith** effort to obtain the information it seeks through  
23    less intrusive means of discovery (*i.e.*, from Mr. Samuelson's and Mr. Beardsley's already  
24    scheduled depositions). *See Celerity*, 2007 WL 205067, at \*5 (exhaustion requirement not met  
25    merely by scheduling those depositions after the depositions of lower-level employees, and it  
26    would not be proper for defendant to take "half-hearted depositions of lower-level employees in  
27    order to set up an opportunity" to take the proposed apex depositions); *In re Google Litig.*, No.  
28    C08-03172 RMW (PSG), 2011 WL 4985279, at \*2 (N.D. Cal. Oct. 19, 2011) (granting apex

1 deposition of CEO to proceed, but prohibiting apex deposition of President; holding that if after  
2 taking the deposition of the CEO Plaintiff could identify topics that only the President could  
3 address it could then file an appropriate motion). Given that these depositions are already  
4 scheduled, but not yet complete, Plaintiff cannot meet its threshold burden here to demonstrate  
5 that the discovery it seeks is not available through less onerous means.

6 **V. CONCLUSION**

7 Plaintiff has not shown, nor can it show, that Mr. Barton possesses any unique, non-  
8 duplicative personal knowledge regarding the facts at issue in this case—namely, those facts  
9 relating to Project Bookshelf—that could justify its request for his deposition. Indeed, any  
10 purported need for Mr. Barton’s deposition will be mooted once Plaintiff meets its requirement  
11 of exhausting all less intrusive ways to gain the information sought, *i.e.*, through the depositions  
12 of Mr. Samuelson and Mr. Beardsley in the next two weeks, as both have integral and intimate  
13 first-hand knowledge of the issues in this case.

14 For all of the reasons set forth above, the Zillow Defendants respectfully request that this  
15 Court enter a protective order prohibiting Plaintiff from taking Mr. Barton’s deposition.

16 **CERTIFICATION:**

17 I certify that this memorandum contains 3,498 words, in compliance with the Local Civil  
18 Rules.

19  
20  
21 Respectfully submitted this 21st day of April 2023.  
22  
23  
24  
25  
26  
27  
28

1 Dated: April 21, 2023

By: /s/ Aravind Swaminathan

/s/ Nicole Tadano

/s/ John "Jay" Jurata, Jr.

/s/ Russell P. Cohen

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